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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

STANLEY G. SILVA, JR., Plaintiff, Cross-Defendant and Respondent, v. BANK OF AMERICA, N.A., Defendant, Cross-Complainant and Appellant.	H037032 (Monterey County Super. Ct. No. M96550)

After a court trial, judgment was entered in favor of plaintiff Stanley G. Silva, Jr., in his action for reformation of a deed of trust and declaratory relief. The original defendant was the buyer of plaintiff's property, but Bank of America, N.A., was added as a defendant and cross-complainant before trial, and it unsuccessfully sought to quiet title and establish the priority of its deed of trust over that of plaintiff. On appeal, Bank of America, N.A. contends that (1) reformation was unwarranted in the circumstances presented at trial and (2) it was entitled to be equitably subrogated to the rights of a prior lender which had recorded its deed of trust before plaintiff's. We agree that the court's reformation of the deed of trust was improper but conclude that the error did not alter plaintiff's right to declaratory relief.

Background

The subject of this dispute is a portion of a 44-acre parcel of land in Monterey County known as the Blackie Meadow Estates. In June 2000 plaintiff purchased an undivided 2/3 interest in the property from Helen Loman and Albert Clausen (the Clausens) for just over $400,000. Plaintiff intended to subdivide his portion, 29.33 acres, into five parcels of approximately five acres each. A tentative subdivision map produced in May 2004 identified Lot 1 as constituting 17.2 percent of the entire 44-acre property.

Edwin Sargenti, plaintiff's friend and employee, agreed to help plaintiff in the subdivision process. In exchange, he was to receive a 17.2 percent undivided interest in plaintiff's 2/3 interest at a reduced price of $200,000. Included as a credit against the purchase price was Sargenti's contribution of $32,825 in interest payments to the Clausens.

Their oral agreement was not documented until June 4, 2004. On that date plaintiff executed a grant deed to Sargenti, who executed a deed of trust to plaintiff. The trust deed described the property by metes and bounds. The parties' understanding, however, was that once the subdivision was approved, Sargenti would receive Lot 1 as depicted on the tentative subdivision map they had prepared. The parties further agreed that the deed of trust would not be recorded until Sargenti received a take-out construction loan. Consequently, the grant deed was recorded on June 28, 2004, while the deed of trust was not recorded until March 7, 2008.

Attached to the June 2004 deed of trust was a promissory note reflecting Sargenti's down payment of $32,825 and promise to pay the balance of $167,176 plus interest. Plaintiff and Sargenti discussed the prospect of paying off the promissory note with the proceeds of the construction loan; that became plaintiff's expectation. Sargenti, however, testified that their understanding was that the note would be paid off when he sold his home in town. When Sargenti appeared to be spending a large part of the loan proceeds on construction, plaintiff became concerned that the note would not be paid. That

observation contributed to plaintiff's decision to record the 2004 deed of trust on March 7, 2008.[1]

At trial Sargenti emphasized that Lot 1 did not exist when he prepared the 2004 grant deed conveying 17.2 percent interest in plaintiff's property. He explained that because there had been no final approval of the subdivision and no certainty of approval, he could only expect that he would receive one of the five lots, amounting to approximately five acres. Consequently, he was not asked to give plaintiff a deed of trust specifically identifying the property as Lot 1. He agreed with plaintiff, however, that the 17.2 percent interest he acquired in 2004 was intended to be Lot 1 upon approval of the subdivision.

The county approved the subdivision of Blackie Meadow Estates in a document recorded on April 7, 2005. In July 2006 Sargenti and his wife were given Lot 1 in a grant deed that identified the property conveyed as Lot 1 of Blackie Meadow Estates.

In February 2007 Sargenti applied for a construction loan from Pacific Valley Bank (PVB). The loan application submitted to PVB listed an address for the property that Sargenti understood to refer to Lot 1, and it stated a land value of $550,000. During the application process, Sargenti did not mention to PVB that he had executed a deed of trust in plaintiff's favor. To his knowledge, PVB was unaware of the deed of trust or any dealings he had had with plaintiff, and it did not appear in the preliminary title report prepared for PVB by Chicago Title Company.[2] A senior credit officer for PVB and the Chicago Title escrow officer both testified that the deed of trust on the PVB loan was intended to be in the first position. Had the bank known of the Silva/Sargenti deed of

[1] Shortly after plaintiff recorded the deed of trust, Sargenti left the company for another job.

[2] The preliminary report did note, however, the July 2006 grant deed to the Sargentis.

trust, it would have compelled Sargenti to pay off the private note, advanced funds to pay it off, or declined the construction loan altogether.

PVB approved the loan on April 30, 2007 in the amount of $658,113, secured by a "Construction Deed of Trust." This deed of trust identified the subject property as Lot 1 of Blackie Meadow Estates as shown on the subdivision map filed for record on April 7, 2005. PVB's deed of trust was recorded on May 7, 2007.

In 2008, after completion of construction on Lot 1, Sargenti applied to three or four lenders for a "take-out" loan. One of those was IndyMac, which opened escrow at Chicago Title Company. Among the numerous exceptions to title insurance coverage in the March 26, 2008 preliminary title report was number 29, the Silva/Sargenti deed of trust dated June 4, 2004 and recorded March 7, 2008. The Chicago Title escrow officer (the same one who had worked on the PVB transaction) sent a payoff demand request to Silva based on the exception found in the preliminary title report.

At trial Bank of America declined to stipulate that the Silva/Sargenti deed of trust was in the chain of title, because the 2006 grant deed described the property as Lot 1, while the deed of trust contained a metes and bounds description of the land. Wess Whitaker, however, testifying as an expert witness for plaintiff, stated that this deed of trust was "most certainly" in the chain of title to Sargenti's property. The title officer for Chicago Title also testified that the Silva/Sargenti trust deed was in Sargenti's chain of title.

The IndyMac loan was never consummated. However, the Sargentis also applied for a $675,000 take-out loan from Home Loan Consultants, Inc. (HLC). This one was granted in April 2008, and the resulting deed of trust was recorded on May 8, 2008. The HLC deed of trust listed Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary.

To facilitate that loan transaction, HLC had opened a "sub-escrow" with LSI, which was charged with ascertaining that recorded loans had been paid off in accordance

with the lender's (HLC's) closing instructions. LSI prepared a preliminary title report dated April 8, 2008, which disclosed only seven exceptions, including the PVB deed of trust, but not the Silva/Sargenti deed of trust. The escrow officer on the transaction testified that HLC intended to have first position on the property. On the list of documents HLC deemed necessary for closing to occur was "First Lien/Title Clearance Letter." Plaintiff argued, however, that because none of the 66 items on that list was checked in the space provided, the "sloppiness, the carelessness" of HLC in failing to give the first-lien instruction to LSI meant that HLC "really didn't care" about being in first position.

HLC paid off PVB, which reconveyed its deed of trust. HLC then sold the loan to Countrywide Home Loans, which had been acquired by Bank of America in 2007 but was still operating under its own name.[3]

The final payment on Sargenti's note in plaintiff's favor ($167,176.00 principal plus four percent annual interest) became due on June 10, 2008. Sargenti, however, had made no payments as of that date. On January 22, 2009, plaintiff filed a complaint against the Sargentis and HLC, requesting declaratory relief and reformation of his trust deed. Plaintiff thereafter amended the complaint to add Bank of America Corporation as a defendant; its subsidiary and servicing agent, BAC Home Loans, LP, appeared in the action. Shortly before trial the parties stipulated that Bank of America, N.A. (also a subsidiary of Bank of America Corporation), which was the actual assignee of the HLC loan, be substituted for a Doe defendant.

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[3] Countrywide had a "correspondent lending" program through which it purchased loans from thousands of other companies. HLC was a "correspondent lender" for Countrywide. Both Countrywide's and Bank of America's correspondent lending programs required that any loan they purchased be in first position. When Countrywide merged into Bank of America, millions of loans were transferred to Bank of America.

The parties further stipulated that Bank of America, N.A., would be permitted to file a cross-complaint. That pleading asserted three causes of action: (1) quiet title to Bank of America, N.A.'s lien against Lot 1 (derived from the HLC deed of trust); (2) establishment of an equitable lien that was senior to any valid lien created by the Sargenti/Silva deed of trust; and (3) declaratory relief, to establish that it had a valid lien against the property, and that it had become subrogated to the rights PVB would have had but for the payoff by HLC.

The court trial took place between February 1 and 3, 2010. At the conclusion of the trial, the court ruled in plaintiff's favor. It specifically found that the Silva/Sargenti deed of trust encumbered all of Lot 1, that it was in Sargenti's chain of title, that it was senior to Bank of America, N.A.'s deed of trust, and that the doctrine of equitable subrogation did not apply. In arriving at that conclusion the court reformed the Silva/Sargenti deed of trust to refer specifically to Lot 1 rather than the metes-and-bounds description in the original document. Judgment for plaintiff was thereafter entered on both the complaint and the cross-complaint. Only Bank of America, N.A., has appealed.[4]

Discussion

Bank of America asserts two principal errors in the judgment: the reformation of the Silva/Sargenti deed of trust and the failure to apply the doctrine of equitable subrogation to accord Bank of America the rights of the beneficiary under the PVB deed of trust. Although there is merit in part of Bank of America's argument, reversal is not required.

1. Reformation of the Trust Deed

Bank of America first contends that the court should not have reformed the Silva/Sargenti trust deed because there was no showing that the description of the

[4] All further references to Bank of America will be to appellant Bank of America, N.A.

property was a result of mistake, within the meaning of Civil Code section 3399.[5] Plaintiff makes no effort to address this argument. He instead notes that the court did not change the size or location of the property, but reformed it merely to conform to the property's new legal description. Plaintiff thus implicitly acknowledges what is readily apparent: that there was no mistake, either mutual or unilateral, in the identification of the property. From the record it is clear that in the deed of trust Silva and Sargenti described the property by metes and bounds because they did not yet have legally created lots for the subdivision—that is, their tentative subdivision map had not yet been approved and recorded. The only errors found by the court were clerical in nature, and its correction of those is not challenged on appeal.[6]

Bank of America further argues that if the Silva/Sargenti trust deed was reformed in order to be consistent with the parties' mutual understanding (i.e., that the trust deed described what would become Lot 1), it had the effect of retroactively creating an agreement that violated Government Code section 66499.30 of the Subdivision Map Act (SMA).[7] Plaintiff again dodges this argument by stating the obvious: that the transfer of

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[5] This provision states: "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value."

[6] In its statement of decision the court found it necessary to correct "the following clerical errors: (a) That the principal amount secured by the deed of trust is $167,176 as opposed to the sum of $200,000 recited therein; (b) That Sargenti's name be changed to 'Edwin J. Sargenti' in place of 'Edwin Sargenti,' and (c) That the date of the promissory note secured by the Silva Deed of Trust be June 10, 2004 as opposed to 'of even date herewith.' "

[7] This provision states, in pertinent part: "(a) No person shall sell, lease, or finance any parcel or parcels of real property or commence construction of any building for sale, lease or financing thereon, except for model homes, or allow occupancy thereof, for which a final map is required by this division or local ordinance, until the final map

the existing 17.2 percent interest was valid when made, irrespective of the parties' intent that the property become Lot 1 when the subdivision was complete. The point Bank of America makes, which plaintiff fails to address, is that by changing the description in the 2004 deed of trust to refer to Lot 1, the court permitted an agreement for the sale of a parcel within a subdivision before the subdivision map was approved. Such sales violate Government Code section 66499.30 and are considered void. (See *Black Hills Investments, Inc. v. Albertson's, Inc.* (2007) 146 Cal.App.4th 883, 893-894 [contract void where sale violated 66499.30, subdivision (b), without exception for express condition on filing of parcel map]; *Sixells, LLC v. Cannery Business Park* (2008) 170 Cal.App.4th 648, 653-654 [sale before final map approval void where no express condition present in contract]; see generally *Van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 563-566 [discussing purpose and provisions of the SMA].)

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thereof in full compliance with this division and any local ordinance has been filed for record by the recorder of the county in which any portion of the subdivision is located. [¶] (b) No person shall sell, lease or finance any parcel or parcels of real property or commence construction of any building for sale, lease or financing thereon, except for model homes, or allow occupancy thereof, for which a parcel map is required by this division or local ordinance, until the parcel map thereof in full compliance with this division and any local ordinance has been filed for record by the recorder of the county in which any portion of the subdivision is located. [¶] (c) Conveyances of any part of a division of real property for which a final or parcel map is required by this division or local ordinance shall not be made by parcel or block number, initial or other designation, unless and until the final or parcel map has been filed for record by the recorder of the county in which any portion of the subdivision is located. [¶] (d) Subdivisions (a), (b), and (c) do not apply to any parcel or parcels of a subdivision offered for sale or lease, contracted for sale or lease, or sold or leased in compliance with or exempt from any law (including a local ordinance), regulating the design and improvement of subdivisions in effect at the time the subdivision was established. [¶] (e) Nothing contained in subdivisions (a) and (b) shall be deemed to prohibit an offer or contract to sell, lease, or finance real property or to construct improvements thereon where the sale, lease, or financing, or the commencement of construction, is expressly conditioned upon the approval and filing of a final subdivision map or parcel map, as required under this division."

We thus agree with Bank of America that reformation of the deed of trust was improper to the extent that it permitted a violation of the strict provisions of the SMA.[8] But the success of plaintiff's action did not turn on reformation of the Silva/Sargenti trust deed. The document described the property by metes and bounds, but plaintiff established that this was the same property that the parties later described as Lot 1. By the time HLC provided its take-out loan and recorded its May 8, 2008 deed of trust, plaintiff had already recorded the Sargenti/Silva deed of trust. Unlike IndyMac, HLC (through LSI) had simply failed to search the chain of title diligently enough to discover this existing lien.

Bank of America conceded at trial that the Silva/Sargenti deed of trust, having been recorded two months earlier, had priority over the May 8, 2008 HLC deed of trust "to the extent that it encumber[ed] an undivided 17.2 percent interest in lot 1 . . . [and] that this did in fact affect the title to lot 1." It argued nonetheless that reformation would be unwarranted on the facts and improper as a matter of law,[9] and it rebutted plaintiff's assertion of the doctrine of after-acquired title.[10] Neither of these two theories was

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[8] It is therefore unnecessary to revisit Bank of America's argument, raised below and on appeal, that reformation was unavailable because HLC was an encumbrancer that acquired its interest in good faith and for value.

[9] In the court below Bank of America opposed reformation on three grounds: (1) the Silva/Sargenti deed of trust was extinguished by the 2006 conveyance of Lot 1 to both Sargentis as community property; (2) reformation was inappropriate because the existing document was not the product of any mistake but fully reflected the contracting parties' intent; and (3) reformation was barred by the statute of limitations, Code of Civil Procedure section 338.

[10] In its statement of decision the trial court briefly alluded to the doctrine of after-acquired title, commenting without analysis that the doctrine supported its finding that the Silva/Sargenti deed of trust encumbered all of Lot 1. In light of our conclusion that the Silva/Sargenti deed of trust had priority over that of HLC, the applicability of the doctrine is moot.

dispositive of the outcome, however, as neither overcame the fact that the deed of trust it acquired from HLC through Countrywide was subordinate to the existing recorded deed of trust.

2. Equitable Subrogation

At trial Bank of America argued that it was entitled to be equitably subrogated to whatever rights PVB had under the PVB deed of trust. Such a ruling, it insisted, would not work an injustice to plaintiff because he would be left in the same position he was in just before the PVB deed of trust was paid off. In the bank's view, as successor to HLC it had the "same right to equitable subrogation that HLC would have had if it had not sold the Sargenti/HLC promissory note to Countrywide."

The court ruled that the doctrine of equitable subrogation did not apply in these circumstances. The court noted that Civil Code section 2898 accords priority to a deed of trust given for the price of real property "over all other liens created against the purchaser, subject to the operation of the recording laws." (§ 2898, subd. (a).) The court further reasoned that even if that statute did not preclude the application of equitable subrogation, an injustice would result from its application, because it would "result in the forfeiture of Plaintiff's ability to collect the purchase price for the sale of Lot 1 to Sargenti." The court also observed that HLC "was not concerned with nor does it appear from the evidence that it relied upon the priority of its deed of trust in making its loan to the Sargentis."

On appeal, Bank of America renews its argument that it was equitably subrogated to the rights of PVB, whose deed of trust had priority over that of plaintiff because it was recorded earlier. Addressing plaintiff's and the trial court's reliance on Civil Code section 2898, Bank of America maintains that this statute did not preclude equitable subrogation, because the Silva/Sargenti deed of trust was given for the purchase price of 17.2 percent interest, not for the purchase price of Lot 1. The success of this argument, however, requires acceptance of a premise that is contrary to the court's factual findings. The court

determined that the two deeds of trust described the same property, a conclusion supported by the testimony of the expert witness, Wess Whitaker.

"Subrogation arises when one party (the subrogee) indemnifies or pays the principal debtor's obligation to the creditor or claimant (the subrogor). [Citation.] The subrogee succeeds to the claimant's position or rights against the principal debtor or obligor." (*Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 432.) The frequently cited rule governing equitable subrogation is derived from *Simon Newman Co. v. Fink* (1928) 206 Cal. 143, 146: " 'One who advances money to pay off an encumbrance on realty at the instance of either the owner of the property or the holder of the incumbrance, either on the express understanding, or under circumstances from which an understanding will be implied, that the advance made is to be secured by a first lien on the property, is not a mere volunteer; and in the event the new security is for any reason not a first lien on the property, the holder of such security, if not chargeable with culpable and inexcusable neglect, will be subrogated to the rights of the prior encumbrancer under the security held by him, unless the superior or equal equities of others would be prejudiced thereby, and to this end equity will set aside a cancellation of such security, and revive the same for his benefit.' " As distilled subsequently by our Supreme Court, this principle is conditioned on a showing of the following facts: " '(1) Payment must have been made by the subrogee to protect his own interest. (2) The subrogee must not have acted as a volunteer. (3) The debt paid must be one for which the subrogee was not primarily liable. (4) The entire debt must have been paid. (5) Subrogation must not work any injustice to the rights of others.' [Citations.]" (*Caito v. United California Bank* (1978) 20 Cal.3d 694, 704.)

In this case the trial court, while noting HLC's carelessness about ascertaining the priority of its own deed of trust, stopped short of attributing HLC's failure to discover the Silva/Sargenti trust deed to "culpable and inexcusable neglect." This cautious approach was consistent with the general view that constructive knowledge (and even actual

knowledge in some cases) of an existing lien is not necessarily a bar to the application of the doctrine. (Compare, e.g., *Copp v. Millen* (1938) 11 Cal.2d 122, 130 ["some knowledge or means of knowledge of the existence of other person's rights in the property does not in every case preclude . . . the relief sought"] with *Lawyers Title Ins. Corp. v. Feldsher* (1996) 42 Cal.App.4th 41, 52 [no relief where lender had actual as well as constructive knowledge of senior trust deed but took no affirmative steps to secure a subordination agreement].) The court did, however, find that allowing equitable subrogation would work an injustice because it "would result in the forfeiture of Plaintiff's ability to collect the purchase price for the sale of Lot 1 to Sargenti." When a judicial determination is one of equity, it must be reviewed under the abuse of discretion standard. (*Dieden v. Schmidt* (2002) 104 Cal.App.4th 645, 654.) We can find no manifest abuse here. Thus, even if equitable subrogation is not foreclosed by Civil Code section 2898, the court's balancing of the equities was properly resolved in favor of protecting plaintiff's interest.

Disposition

The judgment is modified to strike the reformation portion of the judgment to the extent that it alters the legal description of the property in the deed of trust. As so modified, the judgment is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P .J.

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GROVER, J. *

* Judge of the Monterey County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.